

file

**BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS**

Application of Sea View Estates Beach Club,)	
Inc., for a Permit to Construct a Pier on)	3-SE-95-418
the Bed of Pewaukee Lake, Town of Pewaukee,)	
Waukesha County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Pursuant to due notice hearing was held on June 27 and July 12, 1996 at Waukesha, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge (the ALJ). The parties submitted written closing arguments, the last of which was received on August 29, 1996.

In accordance with secs. 227.47 and 227.53(1)(a), Stats., the PARTIES to this proceeding are certified as follows:

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Department of Natural Resources, by

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FINDINGS OF FACT

1. Sea View Estates Beach Club, Inc. (the applicants or the Club), N27 W26748 Lauderdale, Pewaukee, Wisconsin, 53072 applied to the Department of Natural Resources for a permit to place a pier on the bed of Pewaukee Lake. The proposed project is the placement of a 195 foot long pier accommodating 25 boat slips. The pier has been in place, though not at the proposed size, since the early 1960's. The Department and the applicants have fulfilled all procedural requirements of secs 30.12 and 30.02, Stats.

2. The applicants own real property located in the NW 1/4 of the NW 1/4 in Section 17, Township 7 North, Range 19 East, Town of Pewaukee, Waukesha County. The above-described property abuts Pewaukee Lake which is navigable in fact at the project site.

The applicants are a group of residents of a subdivision which does not abut Pewaukee Lake. No portion of the subdivision itself affords the applicants with any riparian status. However, the applicants also jointly own the small riparian parcel described above which includes 60 feet of lake frontage. It is ownership of this small parcel that affords the applicants with such riparian rights as they possess.

3. The applicants propose to authorize by permit a pier which has been placed in the water without specific permit authority for many years. There is no question that the proposed pier extends well beyond the line of navigation and therefore requires a permit under department policy and secs NR 326.04(1) and NR 326.03(3) Wis. Admin. Code. The line of navigation, representing the three foot depth contour, exists at approximately 60 to 68 feet below the ordinary highwater mark. The water depth at the end of the proposed and existing structure is closer to 4.5 to 5 feet. There is no basis in the record for determining that a depth of water greater than 3 feet was required to moor boats at the Sea View pier. Accordingly, a permit was and is required for maintenance of the any pier which extends more that 68 feet into the water.

4. The pier has been placed well beyond the line of navigation for many years without the required permit. Aerial photographs reviewed by the Department indicate that the pier was approximately at or near the line of navigation in 1970. According to the Department, by 1975 it had grown to 110 feet, and by 1995 the pier was fully 199 feet long and moored 17 to 20 slips (Exhibit 17). There is no factual basis in the record to support the claims of the applicants that the pier was somehow "grandfathered" with respect to the need for a sec. 30.12, Stats. permit. Instead, the record indicates that the large pier has been placed at the site for many years without the required permit.

5. The purpose of the pier is to continue to provide Subdivision residents with boat-mooring facilities. The pier also incorporates a near-shore swimming area. No boats are moored along the southwest near-shore area, which is reserved for swimming. The record was clear that some boats could be moored in this area, thereby decreasing the area of public waters occupied by the pier structure. The applicants own by far the smallest piece of riparian property in the area and place by far the biggest pier in public waters of any neighboring properties. (See: Exhibit 8)

6 The Department has established a non-binding Program Guidance (the guidance) to interpret the public interest standard relating to the "reasonable use" of riparian property. (Exhibit 14) The guidance is not applied with the force of law but is used in part to establish a threshold to determine if a riparian has exceeded the "reasonable use" of riparian mooring privileges. This limitation on the use of a given riparian zone is related to the amount of water frontage owned by the riparian and also to whether the pier structure provides any public benefit in the form of rental slips made available to the public. (Id.) Under the program guidance, the applicants, riparian owners of just 60 feet of lake-front property, would be entitled to just two or three pier slips. The pier provides no benefit to the non-riparian public, as would occur from the operation of a public marina.

The guidance reads as follows with respect to Existing Berthing Facilities:

Existing, berthing facilities which exceed "reasonable use" guidelines may continue to rely on any permit which authorizes specific construction. This remains true unless significantly changed conditions and resulting effects on public rights require permit revision (the Department maintains continuing jurisdiction over such projects). The Department may apply "reasonable use" criteria and require modification or commence an enforcement action against any existing facilities (particularly those undergoing major repair) for which a permit has not been issued if it finds that current statutory requirements have not been met. Generally we will not hold existing facilities to the same "reasonable use" guidelines which we will apply to new proposals since, to some extent, they may have established some limited interest in use of existing facilities. (Exhibit 14, p. 5)

The Department's position in this matter is very hard to reconcile with its policy as articulated in its guidance document. The pier has not been validly permitted. It has never moored as many as 25 boats on public waters. It would be fundamentally unfair to riparians who have obtained the required permit to allow greater privileges to an unpermitted facility, however long it has been placed in public waters. However, given the longstanding placement of the pier, it would also be unfair to restrict the pier to the three slips which the guidance would allow for construction of a new pier.

Balancing the rights of the public with the rights of the private riparians, a pier containing 12 slips and extending no more than 110 feet is at the limits of a reasonable use of this small riparian tract. Even when the pier is so reduced, the Subdivision will continue to place the largest pier in the area on the smallest riparian tract.

7. Several neighboring riparians testified that cramming so many pier slips into the small riparian zone lead to conflicts in and around the site, including safety hazards. (Gutowski, Foth,

Zimmerly) There is no question from the record that allowing so many boats to be moored on this small riparian tract has led to incursions into the Zimmerly riparian zone, including specifically areas behind the line of navigation which the common law requires be made available to a riparian. The Zimmerlys have to some extent aggravated these problems by moving their pier closer to the lot line between the two properties. However, this appears to have been motivated by a reasonable desire to protect small children seeking to make use of near shore areas in the face of excessive boat traffic making use of the Club pier. The videotapes offered by the Zimmerlys (Exhibits 25 and 51) well document the congestion at the site and the interference with the use of the Zimmerly riparian zone. Expansion of the existing facility to moor five more boats would plainly violate sec NR 326.04(6), Wis. Admin. Code. The existing intensive use of the shoreline interferes with the riparian rights of the Zimmerly riparian tract

8. Waukesha County has adopted an "anti-pyramiding" provision in connection with the Waukesha County Shoreland and Floodland Protection Ordinance adopted June 23, 1970, and Amended November 14, 1995 (Exhibit 36)

Section 2.02(54a) of the Ordinance defines "pyramiding" as:

"The act of obtaining or providing access to public bodies of water across private lots or lands in a manner which increases the number of facilities which have access to that water to a degree greater than what would occur with individual riparian owners having individual lots fronting on the water. The effect of pyramiding is to funnel backlot development from offshore lots or residences via a narrow parcel of land to provide access to the water. Publicly owned access points shall not fall within this definition."

Sea View argues that the pier is not subject to regulation because Sea View began placing the pier before the Ordinance was enacted. Section 3.15(1) of the Ordinance provides that:

"The existing lawful use of a building or premises at the time of the enactment of [the Ordinance] or any amendment thereto may be continued although such use does not conform with the provisions of [the Ordinance] for the district in which it is located, subject to conditions hereinafter stated." (Emphasis added.)

While section 3 15 of the Ordinance provides that an existing, nonconforming use of structures and lands can continue, this section also provides, pursuant to sec. 3.15(2)(B)1, that "[n]o such use shall be expanded or enlarged." Sections 3 04a(2), 3.15(1) and 3.15(2)(B)1. were enacted on June 30, 1970. Section 21.07. Therefore, assuming the pier was a legal, nonconforming use pursuant to the Ordinance, Sea View could only maintain the pier in the same size and configuration that existed on June 30, 1970

The record is unclear as to exactly how large a pier was maintained by Sea View in June of 1970. The aerial photograph reviewed by the Department suggests a modest structure, perhaps 70 feet long in 1970. (Exhibit 17 and 29) However, the applicants presented a family video tape said to show the installation of the pier in the spring of 1970. The pier installed in the videotape is considerably longer than 70 feet, although its exact length is unclear from the record. Club records put the pier length at 230 feet in 1975. What is abundantly clear from the record is that the

applicants have never moored 25 boats on the public waters of Pewaukee Lake, as they seek to do in the instant application. According to the Club's own review of its own files, the pier moored no more than 12 boats in 1975. (Exhibit 19) One slip was added over each of the next three years, so that the pier moored no more than 15 boats as late as 1978. (Id.) The subdivision residents have dramatically increased their demands on public waters in terms of the numbers of boats occupying space on public waters since the enactment of the Ordinance. This represents a violation of both the letter and spirit of the anti-pyramiding Ordinance.

9. Approval of the instant permit application seeking 25 pier slips on a pier 199 feet long would be detrimental to the public interest in navigable waters in three distinct ways. First, the pier would be excessive in relation to the amount of riparian frontage owned and would accordingly violate the common law "reasonable use" doctrine. Second, approval of such a congested pier on such a small riparian tract would have a detrimental impact on neighboring riparians and would thus violate sec. NR 326.04(6), Wis. Admin. Code. Third, the Waukesha County anti-pyramiding Ordinance reflects the public interest in navigable waters as adopted by the citizens of the County through their elected public officials. Since 1970, the County has sought to limit exactly the type of development reflected at the site, namely residents of a backlot subdivision owning a small riparian strip and then seeking riparian rights reflecting the size of the subdivision more than the size of the riparian tract they own. To authorize more than 12 slips at the site, which is the best estimate of the number of boats moored at the site upon adoption of the Ordinance, would be detrimental to the purposes of the Ordinance as expressed Section 1.02 of the Ordinance. More fundamentally, the doubling of the number of boats moored at the site at the time of adoption of the Ordinance would be detrimental to the purposes of the public trust doctrine to preserve and protect public waters.

10. The proposed structure will not materially obstruct existing navigation on Pewaukee Lake and will not be detrimental to the public interest upon compliance with the limiting conditions of this permit. The existing longer pier is not a significant material obstruction to navigation, given the usual pattern of boat traffic. (Drake) The project area is in a cove which to some extent mitigates the protrusion into the waterway. Some small craft, including canoes, would be forced farther out into the waters at the 200 foot length. However, taken as a whole, the evidence supports a finding that the existing pier is not a material obstruction to navigation on Pewaukee Lake.

11. The applicants are financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

12. The proposed structure will not reduce the effective flood flow capacity of Pewaukee Lake upon compliance with the conditions in the permit.

13. The proposed structure will not adversely affect water quality nor will it increase water pollution in Pewaukee Lake. The structure will not cause environmental pollution as defined in sec. 144 01(3), Stats., if the structure is built and maintained in accordance with this permit.

14. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The applicants are riparian owners within the meaning of sec. 30.12, Stats.
2. The proposed facilities described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.
3. The Division of Hearings and Appeals has authority under secs 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.
4. The placement of piers and other structures in waters is not absolute, but is subject to the common law doctrine of "reasonable use". State ex rel, Chain O'Lakes Assoc. v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972). This limitation on the right to place a pier in public water is related to the extent of water frontage owned by the riparian. Rondesvedt v. Running, 19 Wis. 2d 614, 621, 121 N.W.2d (1963). To allow more than 12 boats to be moored at this site would violate the reasonable use of this small riparian tract.
5. Chapter NR 326 Wis. Admin. Code applies to the instant permit application made June 5, 1995
6. The existing pier and the proposed expansion of the number of boats moored at the site would "interfere with the rights of other riparians" within the meaning of sec. NR 326.04(6), Wis. Admin. Code.
7. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit under sec 30.12, Stats., for the construction of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that.

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.
2. The permittees shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employe of the DNR for the purpose of investigating the construction, operation and maintenance of the project.
3. A copy of this permit shall be kept at the site at all times during the construction of the structure.

4. The permit granted herein shall expire three years from the date of this decision, if the structure is not completed before then.

5. The permittees shall obtain any necessary authority needed under local zoning ordinances and from the U.S Army Corps of Engineers.

6. The permittees shall notify the Water Management Specialist, Marty Johnson, not less than five working days before starting construction and again not more than five days after the project has been completed.

7. Any area disturbed during construction shall be seeded and mulched or ripped as appropriate to prevent erosion and siltation.

8. No heavy equipment shall be operated in the lake at any time unless written notification is made to the Water Management Specialist, Marty Johnson, at least five working days in advance.

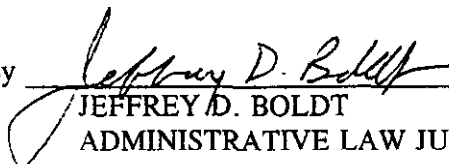
9. The pier length shall not extend more than 110 feet lake-ward of the ordinary highwater mark. No more than 12 boats shall be moored at the pier at any time.

10. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on October 29, 1996.

STATE OF WISCONSIN
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By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.